Supreme Court, U.S.
FILED
FEB 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1061

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH
AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE COPPORATION
OF SEVENTH-DAY ADVENTISTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAX A. CORBETT
5902 Bermuda Dunes
Houston, Texas 77069
(713) 444 2840

Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. Cases

No. 89-1061

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH AND JOHN R. MARIK,

Petitioners,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Seventh-day Adventist Congregational Church and John R. Marik, respectfully affirm their request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, and thus present their reply to brief in opposition.

The Seventh-day Adventist Congregational Church has no parent or subsidiary company.

1. SUPPLEMENTAL STATEMENT OF THE CASE

The following supplemental statement of the case is offered in compliance with Rule 15 of the Court. The General Conference Corporation of Seventh-day Adventists ("Conference Corporation") was not the first legal user of the trade name, trade-mark, and service mark "Seventh-day Adventist." See page 3 of Respondent's Brief in Opposition. The Conference Corporation was not incorporated until 1904. The Conference Corporation is wholly owned, directly and/or indirectly by the General Conference of Seventh-day Adventists ("SDA Conference"), a legal entity which is non-incorporated. As indicated in Petitioners' Petition, first legal use of the name "Seventh-day Adventist" was made prior to the 1860 date set forth by Respondent.

At the hearing held before Judge Russell Smith on February 22, 1988, mentioned by Respondent (see page 4 of Brief in Opposition) there were five motions pending: (1) Petitioners' Motion to Set Aside Judgment, to Dismiss or for a New Trial, for a More Definitive Statement, and To Strike, (2) Petitioners' Motion for Suspension of Injunction and Order, (3) Respondent's Motion for Sanctions, (4) Petitioners' Motion for Sanctions, and (5) Motion for Order to Show Cause Why Defendants Should not Be Held in Contempt. Judge Russell Smith on March 16, 1988, held specifically: "The Motions are each and all DENIED." Page B-3 of Brief in Opposition. Note correspondence with Judge Fong set forth in Appendix A. Accordingly, when an Order to Show Cause Why Defendants Should not be Held in Contempt was entered on April 20, 1988, Defendants filed on May 9, 1988 a Motion to Vacate Order to Show Cause

Why Defendants Should Not be Held In Contempt and a supporting brief. In such motion it was clearly stated: "The matters set in issue by the Show Cause Order have been properly disposed of by this Court's Order filed March 16, 1988, and thus it is res judicata, and the Show Cause Order is improper and should be vacated." Res Judicata is a matter of procedural due process. Thus, the following statement of Respondent regarding procedural due process at page 6 of its Brief in Opposition is incorrect: "This was the first time the argument was made by Petitioners."

It is Respondent, not Petitioners, who have complicated the matter and delayed proceedings below. To illustrate: (1) It was the one to present a Motion for Judgment on the Pleadings, which resulted in an appeal to the Court of Appeals, and then a reversing and remanding, (2) It was the one to contend that Petitioners' Motion

to Set Aside and for other matters was untimely filed, and the District Court agreed with them, until Petitioners presented their Motion to Reconsider with numerous supporting cases, whereon Judge Russell Smith manfully admitted: "Initially I thought that the motions were untimely. I was wrong in that, and now address the merits of defendants' motions." See page B-2 of Respondent's Brief in Oppostion. (3) It was the one who presented matters both in the District Court and in the Court of Appeals, which resulted in motions in both Courts that sanctions be imposed against them.

Though John R. Marik was released from custody on December 20, 1989, as mentioned by Respondent at page 6 of their brief, that has not ended the matter, for he is still subject to summons. Further, it was only when friends of his posted a $25,000 bond on his behalf, that such release was

made possible. He, himself, did not have such funds. Further, he is presently restricted to a specified area within the state of California until summoned. That, in itself, is a great restriction on his freedom of movement.

2. SUMMARY OF ARGUMENT

The manner in which the Court of Appeals decision conflicts with and/or departs from federal law has been given in detail. A review of the federal cases cited in Petitioners' Table of Authorities in their Petition for Writ of Certiorari, and a notation of the argument of Petitioners with regard to these cases, refutes any statement to the contrary by Respondent. The cases cited by Petitioner glaringly stand in a manner adverse to the ruling of the Court of Appeals.

A remand of a case does not preclude it being proper for certiorari review. The contempt order was properly before the

Court of Appeals, contrary to assertions by Respondent.

Judicial notice is proper at any stage of the proceedings, including appeal. Certainly attention has not been called to "extrinsic and irrelevant facts" as contended by Respondent. They are of the essence. When it is considered that this case has come up on a Motion for Judgment on the Pleadings, it can not properly be contended, as does Respondent, that the Court is being requested "to determine facts de novo." See page 7 of Respondent's Brief.

3. ARGUMENT

3.1 The Court of Appeals Has Rendered a Decision In Conflict With The Decision of Another Federal Court Or Which So Far Departed From The Accepted And Usual Course of Judicial Proceedings.

The Court of Appeals specifically held: "Remaining points urged by defendants are

without merit." See page 3, and page App. -8- of Petitioners' Petition. Thus, the Court ruled against them on the following points: (1) that judicial notice of certain matters was appropriate, (2) that the name "Seventh-day Adventist" was generic, (3) that the case involved Freedom of Religion and Speech, (4) that the matter of establishment of a religion was involved, (5) that Respondent was the owner of the trademark "Seventh-day Adventist," (6) that indispensable parties had not been joined to the action, (7) that sanctions should have been imposed against Respondent, (8) that the Contempt Order was properly before the Court of Appeals for decision, (9) that excessive fines and cruel and unusual punishment had been inflicted, and (10) that there had been a deprivation of property without due process of law. Contrary to assertions by Respondent, the Court of Appeals decision, when viewed

overall, could not by any stretch of the imagination "be construed as favorable to Petitioners." See page 9 of Respondent's Brief. When the Court of Appeals held: "Remaining points urged by defendants are without merit.", it did make a determination as to the merits of the authorities cited in the Petition. It did in fact create law contrary to the authorities cited by Petitioners, contrary to assertion by Respondent. Thus, most assuredly this is a case where a court of appeals has rendered a decision in conflict with the decision of another federal court or so far departed from the usual course of judicial proceedings.

3.2 The Case is Proper for Certiorai

The case of Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Company, 389 U.S. 327, 19 L.Ed2d 560, 88 S.Ct 437 (1967) cited by Respondent actually supports the fact that this case

is proper for certiorari. In that case it should be particularly noted that the reason it was held "not yet ripe for review by this Court," was because the Court of Appeals "remanded to the District Court to consider whether there had in fact been a contempt," among other things. Ibid., page 328. As noted by the Court of Appeals in that case, "The union's response was a 'denial in full that we have committed any contempt whatever, in any way, of any order of this court, and secondly, that the outstanding order of this court is invalid.'" Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co., 380 F.2d 570, 574 (1967). In this case, as Respondent admits, and contends, Petitioners "(1) continued use of the General Conference's registered mark 'SEVENTH-DAY ADVENTIST' in connection with Defendant's church services and activities associated therewith; and (2) continued possession of a sign,

literature, and other SDACC produced materials bearing the name 'SEVENTH-DAY ADVENTIST' in violation of the Judgment and Permanent Injunction entered on December 8, 1987." See page 5 of Repondent's Brief.

The instant case is most definitely a proper one for certiorari.

It is not the prerogative of Respondent to dictate to Petitioners the course of action they should pursue to best protect their interests. As previously indicated, to follow the course of action they suggest would be to complicate matters and unduly burden the Courts.

3.3 The Court Should Review The Contempt Order Because That Order Was Properly Appealed, and Should Have Been Addressed By The Court of Appeals

Contrary to assertions by Respondent at pages 10 and 11 of its Brief, the Contempt Order was properly before the Court of Appeals. In addition to matters set forth

in Section 6.4 of the Petition, and as previously noted herein, Defendants filed on May 9, 1988, a Motion to Vacate Order to Show Cause Why Defendants Should Not be Held In Contempt and a supporting brief. In such motion it was clearly stated: "The matters set in issue by the Show Cause Order have been properly disposed of by this Court's Order filed March 16, 1988, and thus it is res judicata, and the Show Cause Order is improper and should be vacated." Res Judicata, being a matter of procedural due process, applicable to the main case, the matter was clearly before the Court of Appeals.

The footnote cited by Respondent in the case of Rogers v. Lodge, 458 U.S. 613, 628 n. 10, 73 L.Ed2d 1012, 102 S.Ct 3272 is set forth verbatim as follows: "Appellants contend that District Court should not have divided Burke County into five districts but should have allowed appellants to

devise a plan for subdividing the county and to submit their plan for preclearance under Sec. 5 of the Voting Rights Act, 79 Stat 439, as amended, 42 USC Sec. 1973c [42 USCS Sec. 1973c]. This contention was not properly raised in the Court of Appeals and was not addressed in that court. We therefore do not address it. See Adickes v. S.H. Kress & Co., 398 US 144,147,n 2, 26 L Ed 2d 142, 90 S Ct 1598 (1970)." Thus, such case stands for the propostion only that in that case under its facts, the Court would not address an issue not raised previously. In this regard, the comment of the Court in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-258, 60 L.ed 629, 36 S.Ct 269 (1916) should be noted: "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that

decision upon complaint's petition for writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari under Sec. 240, Judicial Code [36 Stat. at L. 1157, chap. 231], derived from Sec. 6 of the Evarts act of March 3, 1891, 26 Stat. at L. 828, chap. 517, Comp. Stat. 1913, Sec. 1217."

The Respondent has a misconception of the holding in the case of Halderman v. Pennhurst State School & Hospital, 673 F.2d 628 (C.A. 3, 1982) for such Court states at page 636: "For civil contempt orders the settled rule is that, when directed against parties, such orders are interlocutory and unreviewable except <u>incident</u> to an appeal from a judgment otherwise appealable.", and

citing cases. (emphasis added). Black's Law Dictionary, Fifth Ed., defines "incident" thusly: "When used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal.'"

Other cases noted by Petitioners likewise hold: "If the order is one for civil contempt, a party may appeal the contempt issue as part of any appeal from the final judgment." Union of Prof. Airmen v. Alaska Aeronautical, 625 F.2d 881, 883 (C.A. 9, 1980). "'[A] civil contempt proceeding is in effect a continuation of the main action and therefore a party to a suit may not review upon appeal an order fining or imprisioning him for civil contempt except in connection with appeal from a final judgment in the main action.' Wright, Civil and Criminal Contempt in the Federal Courts, 17 F.R.D. 167, 176 (1955)." Carbon

Fuel Co. v United Mine Workers of Amer., 517 F.2d 1348,1349 (C.A. 4, 1975). "[A] civil contempt order issued against a party lacks the requisite finality because its validity can be tested by an appeal from the final judgment. Fox v. Capital Co., supra; Developments in the Law - Discovery, 74 Har.L.Rev. 940, 996 (1961)." Southern Railway Company v. Lanham, 403 F.2d 119, 124 (C.A. 5, 1968). "The merits of the contempt order against a party can be challenged on appeal from a final judgment to the extent the order affects the judgment or carries with it collateral legal consequences." United States v. Johnson, 801 F.2d 597,599 (C.A. 2, 1986).

The matters above noted declare most eloquently that this Court should review the Contempt Order.

3.4 Judicial Notice of Facts Specified by Petitioners is Proper

The rule of judicial notice applies to

appellate courts, and they will generally take judicial notice of any matter which the court below could have judicially noticed. United States v. Pink, 315 U.S. 203, 86 L.Ed 796, 69 S.Ct 552 (1942); Massachusetts v. Westcott, 431 U.S. 322, 52 L.Ed 349, 97 S.Ct 1755 (1977); United States v. Dolan, 544 F.2d 1219 (C.A.4, 1976).

Under consideration in New York, NH&H Railroad Co. First Mortgage 4% Bondholders Committee v. United States, 399 U.S. 392, 435, 26 L.Ed2d 691, 90 S.Ct 2054 (1970) cited by Respondent at page 13 of its Brief was the "fair liquidation value" of the railroad undergoing reorganization, which was held by the reorganization court to be "property's highest and best use." In Re New York, New Haven and Hartford Railroad Co., 304 F.Supp. 739,799 (D.C. Conn., 1969). Such indeed would involve "myriad factual and legal issues." New York, NH &

H Railroad Co. First Mortgage 4% Bondholders Committee v. United States, 399 U.S. 392, 435 (1970). Such is not the case here. The facts set forth for Judicial Notice are, relatively speaking, extremely limited.

The Court is requested in accordance with the provisions of Rule 201(d) of the Federal Rules of Evidence (hereafter "FRE") to take judicial notice of the adjucicative facts set forth in the Petition for Writ of Certiorari, and particularly as they are set forth in Dictionaries, Encyclopedias, Bible, and other media referenced therein. FRE 201(f) specifies: "Judicial notice may be taken at any stage of the proceeding."

The review requested by Petitioners is proper.

3.5 Certiorari Review Of The Court of Appeals' Refusal To Take Judicial Notice Is Proper

As noted previously, judicial notice may

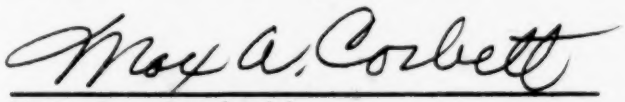
be taken by appelate courts. FRE 201(d) was invoked in the Court of Appeals. A review by this Court of the Court of Appeals handling of judicial notice is proper.

When the basis for the rule of judicial notice is considered, that of eliminating unnecessary legal procedings for the presentation of evidence, it is salutary that the Court consider the matters pertaing to judicial notice in this case.

4. CONCLUSION

For the reasons stated above the writ of certiorai should issue to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,



Max A. Corbett
5902 Bermuda Dunes
Houston, Texas 77069
(713) 444 2840

Attorney for Petitioners

APPENDIX A

CADES SCHUTTE FLEMING & WRIGHT
ATTORNEYS AT LAW

March 22, 1988

HAND DELIVER

The Honorable Harold M. Fong
Chief Judge
United States District Court
for the District of Hawaii
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Re: General Conference Corporation of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, et al.; Civil No. 87-274

Dear Judge Fong:

I am writing to request that the above-referenced litigation be assigned to one of the local district court judges. Two different visiting judges have heard motions in this case and we are experiencing great difficulty in the administrative management of the case, i.e. having orders entered in a timely manner and having to re-brief each succeeding visiting judge on the case history and status. The Honorable Roger D. Foley heard motions filed in mid-1987 and the Honorable Russell Smith heard motions recently filed in this case.

Because of the problems presented by Defendants' ongoing contempt of the Court's Judgment and Permanent Injunction, we anticipate further hearings and the need for expeditious review and action by the Court. At present, we are still awaiting the issuance of an order to show cause by the Court so an appropriate contempt order may be entered and sanctions imposed against Defendants and their counsel for non-compliance with the judgment and permanent injunction.

To save judicial resources and time, I would like to request that one of the local district court judges be assigned to this case. I would also like to take this opportunity to request that a settlement conference be scheduled with the assigned judge pursuant to LR 240.

Thank you for your consideration of this matter.

Very truly yours,

Lorraine H. Akiba
for
CADES SCHUTTE FLEMING & WRIGHT

cc: Max A. Corbett, Esq. (certified mail/return receipt requested)
Vincent L. Ramik, Esq.
Richard W. Johns, Esq.
bcc: Thomas E. Wetmore, Esq.
RAV

MAX A. CORBETT
ATTORNEY AT LAW
5902 BERMUDA DUNES
HOUSTON, TEXAS 77069

TELEPHONE:
(713) 444-2340

March 25, 1988

The Honorable Harold M. Fong
Chief Judge
United States District Court
District of Hawaii
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Re: Civil Action No. 87 0274, General Conference Corporation of Seventh-day Adventists vs. Seventh-day Adventist Congregational Church and John R. Marik

Dear Judge Fong:

I am in receipt of letter dated March 22, 1988, addressed to you from attorneys for plaintiff in the referenced cause of action, relating to the disposition of matters in such case, copy attached.

The real issue in this case is whether the Court had jurisdiction in the first instance to enter the judgment that it did. Basically, this is a trademark infringement action. The sole fact to show such infringement, is the usage by defendants of a church sign announcing its place of worship and inviting those so inclined, to join in worship services. The church sign reads: "Seventh-day Adventist Congregational Church." Plaintiff has a trademark of the name "Seventh-day Adventist."

Any suit for infringement under the Lanham Act which relates to trademarks is dependent upon a showing of some commercial activity. Absolutely none has been shown. Also to be considered in any such suit is whether one's rights under the United States Constitution of freedom of religion and freedom of speech gives him the right to the use of a sign with a name which is intricately interwoven with such religion, as is the case here. Other substantive issues relaing to jurisdiction are also present.

This is a suit of tremendous import, for if the judgment is not overturned on appeal, it will open the door for mass persecution because of one's religion, be it what it may, Christian, Buddhist, Moslem, Hinduism, etc.

Note Judge Smith's order denying Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike entered on March 16, 1988. His comment in hearing of such motion on February 22, 1987, is cogent: "The plaintiff here has won a victory in court. But I am not sure that if you pursue this victory it isn't going to be a pyrrhic one." (Transcript, p. 39, lines 17-19.). "The plaintiff is a conference of a religious group which has certain beliefs which are reasonably unique. The defendant is likewise a religious group which has very similar, if not identical, beliefs. And we have here a struggle between those two religious groups." (Transcript, p. 39, line 25, p. 40, lines 1-4). In such order of Judge Russell E. Smith entered on March 16, 1988 it is specifically stated: "The motion for sanctions is Denied, without prejudice. The problem of sanctions can be considered after the judgment has become final on appeal." (Page 4 of Order). There were three motions for sanctions pending before the Court, one by defendants (see page 1 of Defendants' Memorandum in Support of Defendants' Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement, and to Strike Under FRCP 59 and FRCP 12), and two by plaintiff (See page 2 of Plaintiff's Memorandum in Opposition to Defendants' Motion for Suspension of Injunction and Order Pending Hearing and Ruling on Motion to Set Aside Judgment, to Dismiss or for New Trial, for a More Definite Statement and to Strike Under FRCP 59 and FRCP 12, and also Plaintiff's Motion for Order to Show Cause Why Defendants Should Not be Held in Contempt Because of Defendants' Violation of Judgment and Permanent Injunction.). Thus, Judge Smith has suspended the imposition of sanctions in all areas until "after the judgment has become final on appeal." There has been final disposition by the District Court "of all claims with respect to all parties" as must be noted under Local Rule 13(b)(1)C. of the Ninth Circuit Court of Appeals.

Accordingly, defendants disagree with the contention of plaintiff's attorneys that a further order is required with regard to the matter of contempt. There has been proper disposition of this matter.

Instead of saving judicial resources and time, to follow the recommendations of plaintiff's attorneys as set forth in their letter to you dated March 22, 1988, will have just the opposite effect.

Though defendants would have preferred that Judge Russell E. Smith had granted their motion to set aside judgment, to dismiss or for a new trial, they will agree that it took the wisdom of Solomon to formulate the order he rendered.

Your consideration of this matter is deeply appreciated. Thank you.

Very truly yours,

Max A. Corbett

Max A. Corbett

cc: Roy A. Vitousek, III
CADES, SCHUTTE, FLEMING & WRIGHT
P.O. Box 939
Honolulu, Hawaii 96808

Vincent L. Ramik
DILLER, RAMIK, & WIGHT, P.C.
Merrion Square, Suite 101
7345 Mc Whorter Place
Annandale, Virginia 22003